Congress of the United States
Washington, DC 20510

June 26, 2019

The Honorable Makan Delrahim
Assistant Attorney General
United States Department of Justice, Antitrust Division
950 Pennsylvania Avenue, NW
Washington, D.C., 50530

Dear Mr. Delrahim:

We write today with concerns about the merger of student loan servicers Nelnet Inc. and Great Lakes Educational Loan Services, Inc., which the Department of Justice (DOJ or "the Department") reviewed and approved last year. As a result of this merger, a single company now services nearly 40 percent of all federal student loan debt in the United States. However, evidence continues to accumulate that the U.S. Department of Education ("the Education Department") is failing to conduct adequate oversight of federal student loan servicers, including a recent audit by the Education Department's own Inspector General. These failures exacerbate concerns that the merger has and will continue to substantially reduce competition among student loan servicers and harm student borrowers. We therefore request that you retroactively review this merger and take quick and decisive action to protect borrowers and taxpayers.

In October 2017, Nelnet Inc. (Nelnet) announced a deal to acquire Great Lakes Educational Loan Services Inc. ("Great Lakes") from the Great Lakes Higher Education Corporation for $150 million.[1] After an antitrust review from DOJ, the deal was completed in February 2018, reducing the number of Title IV federal student loan servicers from four to three. With the deal now complete, a single company now services the loans of nearly 15 million federal student borrowers who hold approximately $400 billion in federal student loan debt – nearly 40 percent of the federal student loan portfolio.[2]

While conducting its antitrust review, reports indicated that the DOJ had concerns regarding the merger and sought additional information from Nelnet and Great Lakes.[3] Despite

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these questions and Nelnet's record of problems with compliance,[4] the DOJ ultimately approved the merger without imposing any conditions.

The DOJ's decision to permit this merger absent any conditions suggests the Department concluded that the transaction posed no competition concerns. This conclusion is perplexing given that the DOJ's own guidance suggested that the merger was presumptively unlawful. The antitrust agencies have set out their standards for merger review in the Horizontal Merger Guidelines, which measure market concentration using the Herfindahl-Hirschman Index (HHI).[5] DOJ's antitrust guidelines state that a merger is presumed likely to create or enhance market power – and is therefore presumptively anticompetitive – when a post-merger HHI is greater than 2,500 and the merger increased the HHI by more than 200 points.[6] One independent analyst estimated that Nelnet's acquisition of Great Lakes increased the HHI by 828 points, raising the post-merger HHI to 3,083 and shifting the federal student loan market from a "moderately concentrated market" to a "highly concentrated market."[7] Based on DOJ's own standards and guidelines, it appears the merger has undermined competition in the federal student loan servicing market.

In federal student loan servicing, students cannot choose their servicer in the vast majority of occasions. The Education Department allocates new student loan accounts to servicers with no input from borrowers. Other than the process used to consolidate loans, students have no mechanism through which to change servicers if they are unsatisfied with the service they receive. To induce more of a market in student loan servicing that otherwise does not exist, the Education Department has oversight tools allowing it to evaluate servicer performance and promote competition between the current servicers for their current allocations. These tools include the contractual ability to shift loans from one servicer for poor performance, such as high levels of delinquency or default and low customer satisfaction, to better performing servicers through "competitive, performance-based" loan allocation.[8] At the time of DOJ's approval of the Great Lakes-Nelnet merger, the Education Department claimed that its upcoming overhaul of federal student loan servicing would foster greater accountability and levels of performance among federal student loan servicers.[9] However, it remains unclear how or when

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[4] The Chronicle of Higher Education, "Nelnet to Pay $55 Million to Resolve Whistle-Blower Lawsuit," Kelly Field, August 14, 2010, https://www.chronicle.com/article/Nelnet-to-Pay-55-Million-to/123912/; New York Attorney General, "Attorney General Cuomo Announces Settlement With Nation's Second Largest Loan Consolidator," press release, July 31, 2007, https://ag.ny.gov/press-release/attorney-general-cuomo-announces-settlement-nations-2nd-largest-loan-consolidator; Inside Higher Ed, "Lender Overcharged U.S. $1 Billion, Audit Finds," Doug Lederman, Oct. 2, 2006, https://www.insidehighered.com/news/2006/10/02/lender-overcharged-us-1-billion-audit-finds.

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[7] *Ibid.*.

[8] U.S. Department of Education, Office of Federal Student Aid, "Explanation of Allocation and Performance Measure Methodology" https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/servicer/09302015/ExplanationQuarterEnd093015.pdf

[9] U.S. Department of Education, "U.S. Department of Education Takes Action to Protect Student Borrowers, Hold Higher Education Institutions Accountable for Deceptive Practices," press release, July 25, 2018,

this increased performance would take place, with the contracting process experiencing repeated delays and borrowers in today's system languishing. More than 1 million federal student loan borrowers are defaulting each year.[10]

Although the Education Department purports to hold servicers accountable and to encourage competition between the servicers through its allocation tools and metrics under the current contracts, there is little evidence that this allocation scheme spurs any real competition between the servicers. In fact, new evidence demonstrates that the Education Department has failed to adequately use these tools to protect students or promote competition between the servicers for borrower accounts.

In March 2019, the Education Department's Office of the Inspector General (OIG) released an alarming report finding that the Education Department's Office of Federal Student Aid (FSA) failed to use the tools available to them to hold loan servicers accountable or to competitively incentivize quality service for borrowers.[11] The report found that "FSA's methodology for assigning new loans to servicers did not take into account servicers' compliance with Federal loan servicing requirements or FSA's requirements for servicer representatives' interactions with borrowers."[12] It also found that FSA "rarely used available contract accountability provisions to hold servicers accountable for instances of noncompliance," and that "[n]one of the contracts allowed FSA to establish performance metrics relevant to each servicer's compliance with loan servicing requirements and evaluate individual servicer's performance against such performance metrics."[13]

In instances in which the Education Department was aware of servicer malfeasance, it took little action. FSA rarely penalized servicers for recurring noncompliance and failed to incorporate servicer performance metrics into decisions related to assigning loans to servicers. This lack of accountability, according to the OIG, "could lead to servicers being paid more than they should be" and could create "the impression that [FSA] is not concerned with servicer noncompliance with Federal loan servicing requirements, including protecting borrowers' rights."[14] Ultimately, the report concluded that "borrowers might not have been protected from poor services, and taxpayers might not have been protected from improper payments."[15]

This devastating OIG report reveals that the Education Department is neglecting to use its primary tool for promoting competition between the servicers. This failure represents a severe threat to student borrowers and demonstrates ED's systematic inability to hold student loan servicers accountable. By failing to use the tools at its disposal, the Education Department

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[12] *Ibid.*

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creates no incentive for good behavior or quality service on the part of student loan servicers. Moreover, if servicers receive new loan allocations through the life of their current contracts despite persistent noncompliance, then they simply are not competing against one another for new accounts.

The severity of the Education Department's inaction is compounded in a market with fewer companies. As the number of student loan servicers decreases, the Education Department has increasingly fewer options for redirecting accounts, raising concerns that these companies have become too big to hold accountable. The Education Department has attempted to obscure this market concentration by continuing to treat Nelnet and Great Lakes as two separate companies for loan allocation purposes, as if the two entities continue to compete against one another for business despite the fact that these loan accounts now ultimately end up *at the same student loan servicing company*. This goes far beyond common ownership: one company in practice cannot be two companies on paper, however convenient that may be for avoiding federal antitrust law.

Without real incentives for the Education Department's student loan servicers to help solve our student debt crisis, borrowers across the country, who have zero choice in who services their loans, will be the victims of predatory practices. The new evidence of the Education Department's ongoing failure to protect students and adequately foster market competition in the current contracts reveal the need for DOJ and the Federal Trade Commission to retroactively review this merger. With federal student loan debt now standing at nearly $1.5 trillion, and millions of students across the United States struggling to keep up with their payments, it is the responsibility of the federal government to ensure servicers are working in student's best interest. We urge you to use your authority to again review the merger of Nelnet and Great Lakes.

We appreciate your attention to this matter.

Sincerely,

Elizabeth Warren
United States Senator

Cory A. Booker
United States Senator

David Cicilline
Member of Congress

Congress of the United States
Washington, DC 20510

June 26, 2019

Joseph J. Simons
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C., 20580

Dear Chairman Simons:

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